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"Justice Holmes: A Legend Before Joining the Supreme Court"

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Justice Oliver Wendell Holmes, Jr. once said, "If American law were to be represented by a single figure, skeptic and worshipper alike would agree without dispute that the figure could be one alone, and that one, John Marshall." It has been justly observed that if American law were to be represented by a second figure, it would be Holmes himself, since he was more influential in shaping the agenda for the 20<sup>th</sup> Century Supreme Court than any other legal figure.

Dubbed the "Yankee from Olympus," Holmes, who hailed from a prominent Boston family headed by his father, Holmes, Sr., a medical doctor and a famous New England literary figure, was already a legend in American law before he joined the U.S. Supreme Court. His impact on the nation that he served – as a decorated soldier who fought for the Union Army in the Civil War and as a celebrated writer, legal theorist, practicing lawyer, law professor at Harvard, and judge on the Massachusetts Supreme Court – presaged his impact on generations to come. The lengthy span of his influence was remarkable. Holmes knew Abraham Lincoln and Franklin D. Roosevelt.

Holmes was born into what his father called "the Brahmin caste of New England," the "untitled aristocracy." If Holmes had followed his father's advice, he never would have become an American legend; indeed, he never would have become a lawyer. After the

Civil War, Holmes told his father that he would study law at Harvard. His father replied, "What is the use of that? A lawyer can't be a great man." Dr. Holmes certainly wasn't the first, or last, father to underestimate the talent and potential of a son.

Following graduation from law school, Holmes was admitted to the Massachusetts Bar and began practicing law while serving as a part-time lecturer at Harvard. An aspiring writer, Holmes wrote articles for legal periodicals and edited the 12<sup>th</sup> edition of James Kent's famous treatise, "Commentaries on American Law." Harvard invited him to deliver a set of lectures in 1880, and he decided to speak on the topic of the common law. Nobody could have predicted that the invitation would change Holmes's life and the direction of American law. A year later, he published a book, "The Common Law," which made an immediate impact on legal thinking and was destined to become an iconic work in the world of law.

Holmes's book broke down the walls of the formalism that had come to dominate jurisprudential thinking. He boldly stated, in words quoted a thousand times, "The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."

Holmes promoted the idea that courts should recognize that they must perform a legislative function in an underappreciated manner. Law, he wrote, is drawn from consideration of "what is expedient for the community." In his way of thinking, Holmes said the "felt necessities of the time" and the "intuitions" of what best serve the public interest, even the "prejudices which judges share with their fellow-men,"

are more influential in determining the legal rules that govern society than mere logic.

Holmes's book was, indeed, radical, even revolutionary in its time. He denied the traditional approach, which was to deduce the body of the law from a series of premises, to neatly "fit part to part in a beautiful, neat logical cohesion." He rejected the idea that our legal system could be worked out like mathematics. The law, he said, "embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained the axioms and corollaries of a book of mathematics."

Holmes, of course, was providing a description of what the law was and how it developed over time. More than that, he was prescribing what the law should be, and with it, introducing the theme for American jurisprudence in the decades to come.

"The Common Law" was an instant classic. It led to a full professorship at Harvard in 1882 and an appointment to the Supreme Court of Massachusetts, where he served for the next 20 years. His immense reputation and record of achievement appealed to President Theodore Roosevelt, who told colleagues he wanted to place a man like Holmes on the Supreme Court, which he did in 1902. At the time of his appointment, Holmes was already 61 years old, but that didn't deter Roosevelt, who exhibited unabashed admiration for the Civil War hero.

Roosevelt's admiration for Justice Holmes, however, soon faded when Holmes rendered opinions in anti-trust cases that rankled the president to the point that he denounced Holmes at a press conference. He declared his disappointment and said, "I could carve out of a banana a judge with more backbone than Holmes possesses."

Holmes survived Roosevelt's criticism. He proceeded to serve on the Court until retirement in 1932 at the spry age of 90. We turn next week to Justice Holmes' impact on the life of the law and the nation.

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